

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Roy and Josie Fisher, et al.,

Plaintiffs

and

United States of America,

Plaintiff-Intervenor,

v.

Tucson Unified School District, et al.,

Defendants,

and

Sidney L. Sutton, et al.,

Defendants-Intervenors,

No. CV-74-00090-TUC-DCB

Maria Mendoza, et al.,

Plaintiffs,

and

United States of America,

Plaintiff-Intervenor,

v.

Tucson Unified School District, et al.

Defendants.

No. CV-74-0204-TUC-DCB

ORDER

1
2 Teacher and Principal Evaluations (TPE)

3 On August 28, 2014, at the request of the Mendoza Plaintiffs, the Special Master
4 filed a Report and Recommendation (R&R) related to TUSD's Teacher and Principal
5 Evaluations (TPE). He recommended that the Court direct TUSD to submit Action Plans
6 for dealing with the procedures for evaluating teachers and principals. (Doc. 1659.)
7 Correspondingly, the Special Master had reported in his 2014 Annual Report, that the
8 development of teacher and principal evaluation procedures was delayed. (Doc. 1641.)

9 TUSD took the position that it had developed such procedures and would begin
10 training to implement them in SY 2013-2014, and the USP did not require the
11 development of an Action Plan for this task, which would trigger USP review and
12 comment by the Plaintiffs and Special Master. The Court found: "The teacher and
13 principal evaluation procedures at issue in this R&R are new and will involve significant
14 changes contemplated to implement the USP, such as basing evaluations on effective
15 efforts to include, engage, and support students from diverse racial, ethnic, cultural, and
16 linguistic backgrounds using culturally responsive pedagogy." (Order (Doc. 1760) at 3.)
17 The Court found the express and unambiguous terms of the USP § I.D.1,¹ therefore,
18 required the Special Master and the Plaintiffs to have an opportunity to review and
19 provide input regarding Teacher Evaluation Procedures and Principal Evaluation
20 Procedures. The Court ordered TUSD to prepare an Action Plan and afford the Special
21 Master and the Plaintiffs an opportunity to review and provide input prior to final
22 scheduled approval by the Board of the teacher and principal evaluation procedures. *Id.* at
23 3-4, 6.²

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25 ¹ See USP (Doc. 1713), edited for typographical errors.

26 ² The Special Master set this procedural posture out in his R&R to frame the
27 context for the current issue involving TPEs. The Court denies TUSD's request to strike
28 the "Context" portion of the Special Master's R&R because it accurately reflects the
context of TUSD's objection, which specifically includes TUSD's assertion that it is
overreaching and beyond the scope of authority for the Special Master and/or this Court
to address the adequacy of the weights applied by TUSD in the rubric. Accordingly, the
Mendoza Plaintiffs' Motion to Strike is moot.

1 A year to the day after the first R&R related to teacher and principal evaluations,
 2 on August 28, 2015, the Special Master filed a second R&R, again at the urging of the
 3 Mendoza Plaintiffs. The section of the USP at issue is § IV.H, which provides, with
 4 emphasis added as follows:

5 By July 1, 2013,³ the District shall review, amend as appropriate, and adopt
 6 teacher and principal evaluation instruments to ensure that such
 7 evaluations, in addition to requirements of State law and other measures the
 8 District deems appropriate, give adequate weight to: (i) an assessment of (I)
 9 teacher efforts to include, engage, and support students from diverse racial,
 10 ethnic, cultural, and linguistic backgrounds using culturally responsive
 11 pedagogy and (II) efforts by principals to create school conditions,
 12 processes, and practices that support learning for racially, ethnically,
 13 culturally and linguistically diverse students; (ii) teacher and principal use
 14 of classroom and school-level data to improve student outcomes, target
 15 interventions, and perform self-monitoring; and (iii) aggregated responses
 16 from student and teacher surveys to be developed by the District, protecting
 17 the anonymity of survey respondents. These elements shall be included in
 18 any future teacher and principal evaluation instruments that may be
 19 implemented. All teachers and principals shall be evaluated using the same
 20 instruments, as appropriate to their position.

21 By September 25, 2015, the parties had resolved all but two of the
 22 Mendoza Plaintiffs' concerns that prompted their request for the R&R. The
 23 Special Master filed a revised R&R addressing only those two issues: 1) whether
 24 TUSD agrees to reassess the effectiveness of the teacher evaluation process, if the
 25 Mendoza Plaintiffs agree to accept 10 percent, as proposed by TUSD, instead of
 26 17 percent, as proposed by the Special Master, for weighting student surveys in
 27 teacher evaluations; and 2) whether teacher and student surveys should be
 28 weighted, aggregately, as proposed by TUSD at 10 percent in principal
 evaluations or at 17 percent as proposed by the Mendoza Plaintiffs and Special
 Master. (R&R (Doc. 1845)).

As noted by the Special Master: "[T]he two most important in-school
 influences on student outcomes are teacher and principal effectiveness. Moreover,
 these are interrelated. Any district's ability to foster improvement of teacher and

³ On June 23, 2015, the TUSD Board approved a rubric for site administrator
 evaluations. (R&R (Doc. 1845) at Ex. A4.) On July 14, 2015, the Board approved a
 teaching evaluation instrument. (R&R (Doc. 1845) at Ex. A2.)

1 principal performance depends on having good knowledge of the level of effective
2 practice. Thus, teacher and principal evaluation plans are critically important to
3 achieving the goals of the USP.” (R&R (Doc. 1845) at 3.) This explains the
4 context for the Mendoza Plaintiff’s request for the R&R.

5 In the context of TUSD’s objections to the Special Master’s recommended
6 17 percent, TUSD refuses to “consider the weights assigned to surveys of teachers
7 and students despite analysis of its own staff concluding that the impact of the
8 [10%] weights identified in both plans will be negligible.” *Id.* at 3, *see also*
9 (TUSD Objection (Doc. 1853) at 1-3, 4-6.)

10 In its Objection to the R&R, TUSD informs the Court that it “agrees to
11 review the efficacy of the weight assigned to student surveys as they inform
12 teacher evaluation and does not address that issue further.” (TUSD Objection
13 (Doc. 1853) at 2.) This agreement resolves the first issue addressed in the R&R,
14 but TUSD has agreed to do no more than it is required to do under the law, the
15 USP, and the Court’s January 6, 2012, Order. *Cf., Fisher v. TUSD*, 652 F.3d
16 1131, 1141-42 (9th Cir. 2011) (citing this Court’s findings that TUSD failed to
17 make the most basic inquiries necessary to assess the ongoing effectiveness of
18 student assignment plans and failed to assess program effectiveness to address
19 racial imbalances as impossible to reconcile with a finding that TUSD acted in
20 good faith to cure vestiges of segregation to extent practicable); *see* Order (Doc.
21 1350) at 7-8, § III: Ongoing Oversight (requiring Special Master’s oversight to
22 include annual reports to include evaluation of the effectiveness of programs and
23 provisions established in the USP and recommendations for further review or
24 revisions to these programs and provisions); USP § X: Accountability and
25 Transparency (requiring evidence-based accountability and incorporating the
26 oversight role of the special master as described in the January 6, 2012, Order).
27 Like all the USP provisions, TUSD must review them on an on-going basis for
28 efficacy and, therefore, TUSD must review both the teacher and principal

1 evaluation procedures and instruments especially given the arbitrary nature of the
2 weights set here.

3 According to TUSD: “The parties are before this Court, incurring
4 thousands of taxpayer dollars for the Special Master, TUSD and Plaintiffs to
5 litigate a 7% weight allocation in principal evaluation instruments, when this
6 decision should be left with TUSD.” (TUSD Objection (Doc. 1853) at 2.)

7 TUSD asks the Court to review this issue de novo, Fed. R. Civ. P. 53, and uphold
8 the District’s evaluation instruments if it “‘conforms to the consent decree entered
9 into by the parties and ... is compatible with the Constitution.’” (TUSD Objection
10 (Doc. 1853) at 4 (quoting *United States v. South Bend Community School Corp.*,
11 511 F. Supp. 1352, 1360 (N.D. Ind. 1981)). Here, the Mendoza Plaintiffs and the
12 Special Master assert the Teacher Principal Evaluation (TPE) procedures do not
13 conform to the USP.

14 TUSD argues that if the Court sets the weight for student and teacher
15 surveys for principal evaluations, it will be acting as a ‘super school board’ by
16 micro-managing a programmatic decision which should rightfully be left to the
17 District. *Id.* at 4 (citing *Anderson v. Canton Mun. Separate School Dist.*, 232 F.3d
18 450, 454 (5th Cir. 2000); *Richmond Welfare Rights Org. v. Snodgrass*, 525 F.2d
19 197, 207 (9th Cir. 1975); *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1,
20 12 (1971) (citing *Brown v. Bd. of Ed.*, *Brown II*, 349 U.S. 249, 299 (1955)
21 (“School authorities have the primary responsibility for elucidating, assessing, and
22 solving these problems; courts [] have to consider whether the action of school
23 authorities constitutes good faith implementation of the governing constitutional
24 principles.”)) TUSD asserts that “the USP expressly affords TUSD discretion in
25 this instance”: to determine what is “adequate” weight to afford the teacher and
26 student surveys in principal evaluations. *Id.* at 5.

27 The Court does not agree. The concept of adequacy, i.e., “being good
28 enough,” is not wholly discretionary. It is used in the context of principal

1 evaluations, required pursuant to the USP, which provides that TUSD adopt a
2 principal evaluation instrument using a rubric which gives weight to three things:
3 1) the efforts by principals to create school conditions, processes, and practices
4 that support learning for racially, ethnically, culturally and linguistically diverse
5 students; 2) the use of classroom and school-level data to improve student
6 outcomes, target interventions, and perform self-monitoring; and 3) aggregated
7 responses from student and teacher surveys which protect the anonymity of survey
8 respondents. Of course, TUSD may consider other things such as state law
9 requirements and other appropriate measures. (USP (Doc. 1713) § IV.H.) TUSD
10 proposes the following weighting rubric: 1) Principal Performance (57%); Student
11 Academic Progress (33%); SAI (the Arizona Department of Education Teacher
12 Survey on Leadership (2%); TUSD Teacher Survey (4%), and TUSD Student
13 Survey (4%). The rubric provides for 100 total points.

14 The Special Master explains that the State guidelines constrain the number
15 of points that can be assigned to teacher and student surveys to 17% and that the
16 parties agreed to attribute 10 points to student surveys in teacher evaluations.
17 Plaintiffs Mendoza and the Special Master believe 10% is too low, but as noted
18 above they agreed to it for this year contingent on TUSD's review of its efficacy
19 to evaluate principal performance required pursuant to the USP. TUSD admits
20 the 10-points are "negligible" in assessing a teacher's overall score. This is
21 because the results of the Danielson observations, Principal Performance) are
22 weighted the most heavily and at 57% will have the greatest impact on a teacher's
23 overall score. Academic Growth represents 33% of the total model so that it can
24 impact a teacher's overall score, but not necessarily determine the outcome.
25 Attributing 10 points to the teacher survey will be negligible in assessing a
26 principal's overall performance score. (Teacher Evaluation Scaling 2015 Model at
27 4.)
28

1 The same weights are proposed for principal evaluations, but here TUSD
2 combines student surveys (4%) and teacher surveys (6%) to reach 10 percent.
3 This is to account for the differing interactions between students, teachers, and
4 principals. TUSD does not explain why teachers should not weigh in on a
5 principal's performance the same as a student weighs in on a teacher's
6 performance at 10 percent, with student surveys regarding a principal's
7 performance being an additional weight.

8 Instead, TUSD challenges the Special Master's proposal that student
9 surveys be given 7 points in addition to the 10 points for teacher surveys as a
10 recommendation pulled out of "thin air" and unsupported and lacking any research
11 basis. (TUSD Objection (Doc. 1853) at 6-7.) TUSD presents an affidavit from
12 Dr. Leah Lavigne, Ph.D. which reflects that there is a lack of research suggesting
13 any specific weight, higher or lower, would be an adequate measure of principal
14 performance. *Id.*, Ex. 1: Decl. ¶ 6.)

15 The Mendoza Plaintiffs object to the introduction of this new evidence and
16 argument in what is essentially a reply brief. (Mendoza Plaintiffs' Motion to
17 Strike (Doc. 1855) at 1-2 (describing procedural posture of TUSD's Objection to
18 the Special Master's R&R which does not allow any response without further
19 leave of the Court); *cf. Lentini v. Cal. Ctr. For the Arts*, 370 F.3d 837, 843 n. 6 (9th
20 Cir. 2004) (well established rule that courts will not consider arguments raised for
21 the first time in a reply); *Gadda v. State Bar of Cal.*, 511 F.3d 933, 937 n.2 (9th
22 Cir. 2007) (same). The Court finds that either weight, 10 or 17 percent, is not
23 research based. (TUSD Objection (Doc. 1853), Ex. 1: Lavigne Decl. ¶ 6.)

24 The evidence reflects that "these [10%] weights were deliberately
25 determined through the ELI meet and confer agreement that resulted from an
26 approximate three month process of collaboration and negotiation with TUSD
27 regarding the evaluation of principals." (TUSD Objection (Doc. 1853), Ex. 2:
28 Daniel Erickson Decl. ¶ 3.) The ELI (Education Leaders, Inc.) is the collective

1 bargaining voice for school principals, assistant principals, psychologists, and
2 research project managers. As such, the ELI is concerned with the impact of these
3 evaluations on a principal's livelihood, including eligibility for multi-year
4 contracts and other employment benefits. *Id.* ¶ 10. While compensation for
5 principals is a legitimate concern for ELI and, correspondingly, administrative-
6 union relations is a concern for TUSD, employee compensation is not a factor for
7 assessing the adequacy of the weight for teacher surveys in the context of the USP.
8 Here, the weight afforded the survey data must be adequate to meet the student
9 achievement and integration goals of the USP, i.e., adequate to improve teacher
10 and principal effectiveness.

11 The Court, therefore, turns to TUSD's assertions that teacher and student
12 surveys will not serve the purpose of improving the effectiveness of principals.
13 The Special Master makes a strong argument when he asks: How, [without the
14 surveys], will TUSD complete the "School Behaviors" portion of the Principal
15 Performance evaluation, which requires the evaluator to determine what teachers
16 and students believe and experience? But, TUSD responds that any increase in
17 weight given to teacher/student surveys will necessarily reduce the 57% weight it
18 gives to the Principal Performance Measure, which is an objective measure of
19 principal performance as compared to evaluating principals based on subjective
20 surveys. The Court has looked at the Principal Performance measures. It includes
21 criteria which are equally subjective, such as two found in the very first rubric:
22 whether the principal promotes the development of an inclusive school climate
23 characterized by culturally responsive strategies or whether staff members do not
24 see the principal as lead learner in the school. (R&R (Doc. 1845-4), Administrator
25 Evaluation Rubric at CM/ECF page 3.) Depending on the type of evidence the
26 evaluator chooses to rely on—the Principal Performance Measure will be more or
27 less objective than subjective.

1 The Court understands an “objective test” to be one where the subjective
2 judgment by the grader is eliminated, Webster’s New Collegiate Dictionary
3 (1973), i.e., relating to, or based on externally verifiable phenomena, Black’s Law
4 Dictionary 1103 (8th ed. 1999). In comparison, a subjective test is based on an
5 individual’s perceptions, feelings, or intentions, as opposed to externally verifiable
6 phenomena. Black’s Law Dictionary 1465 (8th ed. 1999). So, if the evaluator
7 relies on his or her personal perception of a principal’s attitude it will be subjective
8 versus reliance on verifiable data such as counting the number of teacher
9 workshops or student activities promoting cultural-diversity. Based on the record
10 before the Court, TUSD does not prevail on its assertion that the Principal
11 Performance measure is more objective and, therefore, more reliable than the
12 Survey measures. The issue appears to be who should be making the subjective
13 evaluations: teachers or the principal evaluators.⁴

14 The issue of whether principals should be responsible for preparing teacher
15 evaluations is no longer in dispute, but the ELI complains that it is an inherent
16 contradiction between the Special Master’s determination that principals are not
17 well-suited to perform teacher evaluations because principals have a desire to be
18 “liked” by their teachers and his position that teachers be allowed to weigh-in
19 regarding principal evaluations. The ELI argues that for the Special Master to be
20 consistent, he should recommend that teachers should not evaluate principals.

21 The two evaluations are not analogous. The better analogy is the role of the
22 principal evaluators, who directly supervise the principals, and their having
23 responsibility for conducting the Principal Performance evaluations in the same
24 way principals are responsible for the Teacher Performance evaluations. In the
25 same way that principals want to be liked by the teachers they supervise, which
26 can cause principals to be overly generous in their teacher evaluations, TUSD’s

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28 ⁴ The Court assumes the principal evaluators will be the principals’ direct supervisors in the administrative chain of command.

1 Elementary and Secondary School Directors, who supervise principals, may be
2 compromised in the role of evaluator to critique principals. This argument only
3 suggests the importance of the student and teacher surveys, which are anonymous,
4 and provide a double-check to the Principal Performance measurement completed
5 by the Directors. Students and Teacher surveys are not interchangeable given the
6 differing nature of the relationships they hold with principals.

7 In conclusion, the Court finds that given the importance of evaluating the
8 efforts by principals to create school conditions, processes, and practices that
9 support learning for racially, ethnically, culturally and linguistically diverse
10 students, there must be adequate weight given to the opinions of students and
11 teachers regarding these conditions, processes, and practices. The Court cannot
12 find that 10 percent, a weight which is admittedly negligible in the overall
13 evaluation of a principal's performance, is adequate. The Court must, however,
14 consider TUSD's question: "When the USP specifies no specific percentage and
15 there is agreement to the 10% weight afforded student surveys in teacher
16 evaluations, how in the world can the 10% weight assigned in the principal
17 evaluation instrument to student/teacher surveys amount to a 'clear' violation of
18 the USP?" (Objection (Doc. 1853) at 5.) The answer is that it is an arbitrary
19 weight. The evidence reflects that it was arrived at in large part because the ELI
20 would not agree to more. (R&R (Doc. 1845-10) at Ex. G: TUSD's Alignment
21 Response at 2.) Additionally, the State Teacher Survey (SAI), which accounts for
22 2 of the 10 points, is generic and its questions are not aimed at identifying efforts
23 by principals to create school conditions, processes, and practices that support
24 learning for racially, ethnically, culturally and linguistically diverse students.
25 (R&R (Doc. 1845-9) at CM/ECF 314-316.)

26 The Court accepts the 10 percent for the limited purpose of this year,
27 pending further review and evaluation for efficacy related to accomplishing the
28 goals of the USP. Because of the findings outlined above, the Court will not adopt

1 TUSD's proposal to aggregate the weight of the teacher and student surveys. By
2 TUSD's own suggestion: if 10 points are given to student surveys in respect to
3 teacher evaluations, the same should apply to principal evaluations. For now,
4 teacher surveys shall be 10% of the principal evaluation, with student surveys
5 weighing at least half that, i.e., an additional 5% of the principal evaluation.

6 **Accordingly,**

7 **IT IS ORDERED** that the R&R (Doc. 1845) is adopted in part by the
8 Court as follows: Teacher surveys shall be 10% of the principal evaluation, with
9 student surveys weighing at least an additional 5% of the principal evaluation.

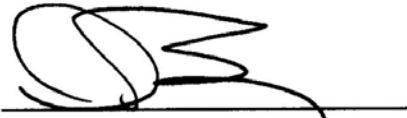
10 **IT IS FURTHER ORDERED** that the Clerk of the Court shall correct the
11 case docket to reflect that the R&R (Doc. 1836) is not pending because it was
12 replaced by the R&R (Doc. 1845).

13 **IT IS FURTHER ORDERED** that TUSD shall undertake further review
14 and evaluation of the adequacy of these weights to effectively measure teacher and
15 principal performance in the context of USP.

16 **IT IS FURTHER ORDERED** denying TUSD's request to strike portions
17 of the Special Master's R&R, and therefore, the Motion to Strike (Doc. 1855) filed
18 by the Plaintiffs Mendoza is DENIED AS MOOT.

19 Dated this 26th day of January, 2016.

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David C. Bury
United States District Judge